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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. —813

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

BILL DANIELS, INC., AND WALKER MOTORS, INC.

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GILBERT MOTOR SALES, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Acting Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Sixth Circuit entered on January 20, 1953, which denied enforcement of orders issued by the Board against Bill Daniels, Inc., Walker Motors, Inc., and Gilbert Motor Sales, Inc.[1]

[1] As explained more fully, *infra*, the *Daniels* and *Walker* cases were consolidated before the Board, and the *Gilbert* case was consolidated with the *Daniels-Walker* case for pur-

OPINIONS BELOW

The original opinion of the court below (D. 153–160) and the opinion denying rehearing (D. 169–171) are reported in 202 F. 2d 579. The findings of fact, conclusions of law and order of the Board in the *Daniels-Walker* case (D. 72–84, 93–98) are reported at 96 N. L. R. B. 1255; the Board's findings, conclusions and order in the *Gilbert* case (G. 157–166, 175–178) are reported at 97 N. L. R. B. 98.

JURISDICTION

The judgments of the court below were entered on January 20, 1953 (G. 197, D. 151). A petition for rehearing (D. 160–166), filed by the Board on February 6, 1953, was denied on March 17, 1953 (D. 169–171). The jurisdiction of this Court is invoked under 28 U. S. C. 1254, and under Section 10 (e) of the National Labor Relations Act, as amended.

QUESTIONS PRESENTED

1. Respondents are Michigan automobile dealers operating under an agreement with the Ford Motor Company which is intended "to protect the good name and good will and business" of Ford and "to enable [Ford] to schedule its production

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poses of oral argument in the court below. For purposes of this petition, we cite the *Daniels-Walker* record as "D." and the *Gilbert* record as "G." The proceedings in the court below are bound in with the *Daniels-Walker* record at D. 151–171.

effectively." Pursuant to this agreement respondents regularly advise Ford of their anticipated needs of automobiles, parts, and accessories. A large percentage of the parts and accessories which Ford regularly supplies to respondents is manufactured outside the State of Michigan; the new cars similarly supplied respondents are assembled in Michigan from parts of which a large percentage is manufactured outside the State. The first question presented is whether respondents, who sell these cars, parts, and accessories largely within the State, are engaged in an activity affecting commerce within the meaning of the National Labor Relations Act.

2. Whether the Board, in determining whether a respondent's business affects interstate commerce, properly took official notice of evidence contained in a prior proceeding before it which involved the same respondent and the same issue.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), and of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1001), are set forth in the Appendix, *infra*, pp. 27–32.

STATEMENT

I. The business of the several respondents

Each of the three respondent employers here involved refused to bargain with the union certi-

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fied by the Board, each claiming that its business did not affect commerce within the meaning of the Act (G. 186–187; D. 57, 63). The facts with respect to each employer's business may be summarized as follows:

A. GILBERT MOTOR SALES, INC.

Gilbert Motor Sales, Inc., hereinafter referred to as Gilbert, is a Michigan corporation engaged in selling and servicing new and used automobiles, parts, and accessories, with its principal office and place of business in Detroit, Michigan (G. 23–24, 158; 42, 51, 69, 140, 147–148, 152). It operates retail sales and service departments under a franchise from the Ford Motor Company of Dearborn, Michigan, from which it purchases virtually all its new cars, trucks, parts and accessories (G. 23–24, 158–159; 42–44, 51, 69, 107–113, 140–141, 147–148, 152). Gilbert's purchases during the first six months of 1948 amounted to $234,060.97 (G. 51–53); during the last six months of 1949, its purchases amounted to $798,021.27 (G. 158; 140, 191). Gilbert's sales, during the first six months of 1948 were in the amount of $371,264.02 (G. 52), while those during the second half of 1949 amounted to $842,362.80 (G. 158; 140, 191). Cars and trucks account for approximately 75 percent of Gilbert's purchases and sales; parts and accessories make up the balance (R. 51–52).

Approximately 54 percent of the parts and accessories sold by the Ford Motor Company to its

dealers for service purposes during the first half of 1948 were purchased by the Company from vendors located outside the State of Michigan and were resold to the dealers without further processing by the Company (G. 61, 66–69, 70–71). Using the percentages noted above, Gilbert's purchases of parts and accessories produced outside the State of Michigan, during the first six months of 1948, amounted to over $30,000, and during the last six months of 1949 to over $110,000.[2] While virtually all purchases and sales were made within the State of Michigan, the cars and trucks purchased by Gilbert, assembled by the Ford Motor Company in Michigan, were comprised largely of finished parts manufactured outside the State (G. 24, 158–159; 67–68, 73, 84).[3] Moreover, one-half of one percent of the Fords delivered to all dealers in Wayne County, where Gilbert is located, were completely manufactured outside the State (G. 71–72, 100–101).

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[2] These figures do not include the value of out-of-state equipment included on new cars assembled in Michigan, see note 3, *infra*.

[3] Many products, such as radiators, springs, wheels, coil springs, running boards, running board brackets, forgings for passenger cars and for trucks, transmissions, differentials, front suspensions, rear axles, and engine parts are manufactured by Ford outside the State of Michigan and are incorporated into the finished vehicles at the Michigan plant (G. 68, 73). In addition, Ford purchases tires, bumpers, and accessories from vendors whose plants are located outside the State (G. 73, 76).

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Gilbert, like the other 7,600 authorized dealers of the Ford Motor Company, is part of the nation-wide Ford Sales Organization, which is virtually the sole outlet for the sale of the Ford Motor Company's products, and is the end link of a vast industrial empire for the manufacture and distribution of Ford automobiles and trucks, Lincoln and Mercury automobiles, tractors, bus chassis, and parts and accessories for these vehicles (G. 24, 158–159; 32–43, 46, 60, 63–64, 75). Each dealer, when approved by Ford, executes a "Ford Sales Agreement" which is in the nature of a "franchise" from the Ford Motor Company (G. 43–44, 90, 107–113, 140, 193).

The purpose of the sales agreement is "to protect the good name and good will and business of [Ford Motor] Company, to assure Company that Company products will be made available to public and that service facilities will be made available to ultimate users of its products, and to assure or inform Company of the financial stability of Dealer" (G. 113). The agreement expressly "is intended" to "govern all relationships between Company and Dealer" (G. 43, 46, 79–80, 107) and also regulates the dealer's relationship with the public and with other dealers (G. 43–44, 80–82, 90–93, 99, 104–105, 108, 109–111, 193).

Upon the terms and conditions set forth in the sales agreement, the dealer obtains the privilege of purchasing, for resale at retail anywhere

within the United States, Ford automobiles, trucks, parts, and accessories (G. 107). The dealer agrees to purchase and pay for Company products in cash, except when the invoice shows the sale to be on credit (G. 50, 107),[4] at prices fixed by the Company, and to maintain specified stocks of automobiles, parts and accessories (G. 56–57, 77, 93–94, 96–98, 107, 109).[5] "To enable the Company to schedule its production effectively," dealers' orders sufficient to maintain the prescribed stocks of automobiles must be submitted before the tenth day of each month, and those for parts and accessories on dates designated by the Company (G. 109).

Other operations of the dealer's business, in addition to those concerning stocks of vehicles, parts, accessories, and orders, are also subject to extensive control by the Company under the sales agreement. The dealer's place of business must be maintained at a location and in a manner acceptable to the Company (G. 76, 89–90, 95–96, 108). The dealer is required to install tools, machinery, and equipment recommended by the Company (G. 70, 75, 108); to display approved

[4] Except in such credit sales, the Company retains title and power to retake and resell until it has actually received cash payment of the full purchase price (G. 50, 107–108).

[5] The sales agreement requires stocks of from eight to twelve percent of the previous year's retail deliveries of current model automobiles and trucks, and at least one-sixth of the previous twelve months' sales of parts and accessories (G. 93–94, 109).

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Ford signs conspicuously (G. 76, 108); to install and maintain an accounting system in accordance with the "Ford Dealers Accounting System Manual" as approved by the Company (G. 108); to submit financial statements when required by the Company on forms approved by the Company (G. 42–44, 61, 108, 117–118, 142–143); to submit "Dealer's Ten Day Reports" (G. 42–44, 61, 108, 115–116, 142–143); and to permit the Company to examine all records, contracts, and accounts, to inspect the dealer's stock and place of business, and to test the dealer's equipment and facilities (G. 70, 75, 90–93, 108).

Finally, each dealer pays to the Company, as part of the Company-fixed purchase price, a charge of $20 for each Ford vehicle (G. 44, 55, 62–63, 83, 84, 142). This fund is used by the Company, in its discretion, for promoting and advertising the Company's products and services (G. 44, 55–56, 75, 83). From these funds, in part, the Company defrays the cost of advertising through national radio programs and newspapers, as well as the cost of supplying its dealers with catalogs, handout materials, and other descriptive literature and sales manuals covering its products (G. 44, 62, 75, 82–84).

B. BILL DANIELS, INC.

Bill Daniels, Inc., hereinafter called Daniels, is a Michigan automobile dealer and operates, as does Gilbert, under a sales agreement with the

Ford Motor Company (D. 113, 118–119). During the first six months of 1949, Daniels' total purchases amounted to approximately $650,000, including approximately $51,000 worth of parts (D. 74; 44, 55, 103, 138–139). As noted in the case of Gilbert, over half the parts handled by Ford dealers in Michigan are manufactured outside the State (G. 61). Daniels' total sales during the first six months of 1949 amounted to about $1,193,000, of which about $11,930 represented direct sales in interstate commerce (D. 74; 139).

C. WALKER MOTORS, INC.

Walker Motors, Inc., hereinafter called Walker, is, like Gilbert and Daniels, a Ford dealer located in Michigan and operating under the same sales agreement (D. 60, 61, 112, 145). At the time of the hearing in the representation case, the statistics of Walker's operations as a Ford dealer covered a period of only six weeks (D. 146). Projecting those figures on an annual basis, Walker's total annual purchases would be $1,700,000, including over $85,675 worth of parts, over half of which, as noted above, are manufactured outside the State (D. 146, G. 61). Walker's annual sales, based on its first six weeks as a Ford dealer, would total $2,606,000 (D. 146).

II. Proceedings before the Board

A. THE GILBERT CASE

In April, 1948, the International Union (United Automobile, Aircraft, and Agricultural Implement Workers of America, CIO) filed a petition with the Board, claiming that it represented a majority of Gilbert's employees (G. 19–21). The same Union filed similar petitions with respect to twenty-one other Michigan automobile dealers (G. 22–23). At the hearing of all twenty-two petitions, which were consolidated, Gilbert, like the other dealers, specifically objected to the Board's assertion of jurisdiction, claiming that it was not engaged in activities affecting commerce (G. 39–40). Gilbert stipulated certain facts relative to its interstate business and also stipulated that Gilbert and all the other dealers operated under identical agreements with the Ford Motor Company (G. 51–52, 56). A representative of Ford, appearing in response to a subpoena, testified at length as to the extent to which Ford received parts from outside the State and as to the relationship between Ford and its dealers (G. 59–88). From the evidence showing the nature of Ford's operations and of the dealers' business, the Board determined that each of the dealers was subject to the Act and directed an election at each plant (G. 22 *et seq.*). At the plant of respondent Gilbert, the Union lost the election (G. 33–35).

In May of the following year, the International Union, this time joined by its Local 408, instituted another representation proceeding with respect to Gilbert (G. 119 *et seq.*). At the hearing in this proceeding counsel for Gilbert referred to the exhibits introduced at the hearing a year earlier and noted his willingness to have the Board refer to those exhibits (G. 140–142). The second proceeding culminated in an election which the Union won (G. 124–130), and it was certified by the Board (G. 136–137).

When Gilbert, notwithstanding the certification, refused to bargain, the Union filed the unfair labor practice charge giving rise to the present action (G. 145–147). At the hearing on this charge Gilbert again put in issue the question whether its business affected commerce (G. 153, 181). On this issue the trial examiner and the Board, with due notice to Gilbert, took official notice of the record before the Board in the earlier (April, 1948) representation proceeding (G. 175, 187–192). This record—"incorporated by reference" in the unfair labor practice case (G. 190, 192)—was later included in the certified record lodged with the court below (G. 14–16). On the entire record, the Board, concluding again that Gilbert was subject to the Act, held that Gilbert had unlawfully refused to bargain (G. 175–177).

B. THE DANIELS-WALKER CASE

Following the filing of separate petitions for representation of Daniels' and Walker's employees, the Board held hearings, concluded, over objections, that each respondent was engaged in commerce within the meaning of the Act, determined the scope of the appropriate bargaining units, and directed separate elections at each respondent's establishment (D. 16–21, 75–76; 22–24, 30–32, 45, 56–57, 134, 140–141). The International Union obtained a majority of the eligible votes in both elections and was thereafter certified by the Board (D. 76; 25–28, 33–36, 45–46, 57, 103–104).

Notwithstanding the certifications, each respondent refused to bargain with the Union on the sole ground that respondent was not subject to the provisions of the Act (D. 76, 77; 46–47, 57–58, 107–108, 109). The Union thereupon filed unfair labor practice charges with the Board, on the basis of which the General Counsel issued an order consolidating the cases for hearing and a consolidated complaint alleging that each respondent had violated Section 8 (a) (5) and (1) of the Act by its refusal to bargain with the certified representative of its employees (D. 72–73; 38–49, 66–67).

At the hearing, each respondent admitted its refusal to bargain with the Union, and the evidence introduced in the representation proceed-

ings was incorporated by reference without objection (D. 46–47, 57–58, 63–64, 104–105, 107–108, 109, 110–111). On the basis of this evidence and further evidence as to respondents' relationship to Ford (D. 111–119), the trial examiner and the Board (D. 72–84, 93–94, 98) determined that each respondent was engaged in activities affecting commerce within the meaning of the Act (D. 74–75), and accordingly concluded that respondents' admitted refusal to bargain with the Union violated Section 8 (a) (5) and (1) of the Act (D. 76, 78, 79).

III. The Board's orders

The Board ordered each of the three respondents to cease and desist from refusing to bargain collectively with the certified Union as the exclusive representative of its employees in the unit previously found appropriate, and from in any other manner interfering with the efforts of that Union to bargain on behalf of its employees (G. 175–178; D. 93–94, 95–96). Affirmatively, each order requires the respondent to bargain with the Union upon request, and to post the usual notices (G. 175–178; D. 94, 95–98).

IV. The decision of the court below

The court below set aside the orders of the Board on the ground that none of the respondents was engaged in an activity affecting commerce within the meaning of the Act. Holding that

"The circumstance that these dealers made all of their purchases in Michigan and practically all of their sales in Michigan is the controlling fact of the case" (D. 157), the court rejected the Board's contention that interstate commerce was affected through respondents' relations with Ford Motor Company. The court observed that these dealers were neither employees nor agents of Ford (D. 158) and could not properly be termed "franchised dealers" since only a sovereignty or state can confer a franchise (D. 154). Recognizing that its decision was in conflict with the decisions of the Court of Appeals for the First Circuit in *National Labor Relations Board* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769, and *National Labor Relations Board* v. *Somerville Buick*, 194 F. 2d 56 (D. 159–160), the court in its original opinion and in its opinion denying rehearing held that the out-of-state goods sold by respondents "came to rest in the [Ford] Dearborn warehouse" (D. 170), and that "If there is any connection between [respondents'] local operations and interstate commerce, it is too remote to subject these respondents to the operation of the Act" (D. 159).

The court held further that the Board had erred in taking official notice of the facts in the earlier representation proceeding involving re-

spondent Gilbert (D. 156).[6] In its opinion denying rehearing the court rested this conclusion on its view that a different local union was involved in the earlier case, that the cases of other employers had been consolidated in the earlier record, and that as a general rule the Board could not take official notice of the record in other proceedings before it (D. 169–170).[7]

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that respondents' businesses did not affect commerce within the meaning of the Act.

2. In holding that the Board could not take official notice of the record made before it in a prior proceeding involving the same respondent and the same issue.

3. In failing to issue decrees enforcing the orders of the Board.

REASONS FOR GRANTING THE WRIT

1. The holding of the court below that respondents' activities do not affect commerce is in square

[6] The court sustained the Board's procedure in permitting the introduction of new evidence in the *Daniels-Walker* unfair labor practice hearing as to respondents' relationship to Ford (D. 156).

[7] The court advanced still other grounds for reaching this result in its original opinion (D. 156), but appears to have abandoned them in its later opinion. All the grounds advanced in both opinions are discussed *infra*, pp. 22–26.

conflict with the decisions of the Court of Appeals for the First Circuit in *National Labor Relations Board* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769, and *National Labor Relations Board* v. *Somerville Buick*, 194 F. 2d 56, and with the decision of the Court of Appeals for the Ninth Circuit in *National Labor Relations Board* v. *Howell Chevrolet Company*, — F. 2d —, 31 L. R. R. M. 2462. Expressly recognized both by the court below (D. 159–160) and by the Court of Appeals for the Ninth Circuit (in the *Howell* case, *supra*), this conflict of decisions has led us not to oppose the petition for certiorari already filed by the employer in *Howell* (No. 703, this Term) and to apply now for review of the instant decision. For we think the obviously important issue in these cases as to the jurisdiction of the Board, affecting many of the thousands of sales outlets of a major national industry[*] (and probably affecting similar dealers in other industries as well), requires resolution by this Court. Moreover, we believe that the decision of the court below is contrary to controlling decisions of this Court.

certiorari granted May 18, 1953

[*] The impact of the decision of the court below cannot be restricted to automobile dealers located in Michigan. Although Ford's main plant is in Michigan, it maintains assembly plants in several other States; see, for example, the *Ken Rose* case, *supra*. The Michigan plant is no different from the other plants in that in each the major portion of the parts which make up the completed automobile are manufactured outside the State in which the vehicle is assembled.

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It is undisputed, of course, that the shipment of parts across State lines to Ford's assembly plant and warehouse is interstate commerce. It is equally clear that a work stoppage at any of respondents' places of business would curtail Ford's need for out-of-State parts and hence would "affect commerce" within the meaning of the Act. To be sure, the effect of a strike by the employees of any one dealer would not be critical, but, as this Court has twice observed, the question "is not to be determined by confining judgment to the quantitative effect of the activities immediately before the Board. Appropriate for judgment is the fact that the immediate situation is representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 648; *National Labor Relations Board* v. *Denver Building Trades Council*, 341 U. S. 675, 685, n. 14; see also *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 236.

There is, in short, no basis for the conclusion of the court below (D. 159) that the impact of respondents' activities on interstate commerce is "too remote" to warrant the Board's assertion of jurisdiction. "Congress has explicitly regulated not merely transactions or goods in interstate commerce but activities which in isolation might

be deemed to be merely local but in the interlacings of business across state lines adversely affect such commerce." *Polish National Alliance* v. *National Labor Relations Board*, 322 U. S. 643, 647–648.[9] Nor is there any doubt that the power of Congress (and hence the power of the Board, since Congress in the National Labor Relations Act has exercised "whatever power is constitutionally given to it to regulate commerce," *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601, 607) extends to intrastate transactions which themselves affect interstate commerce. This broad power clearly reaches the situation here where, although not owned by Ford, each respondent dealer is so closely integrated into Ford's operations as to constitute merely the end link in Ford's multistate business of manufacturing and distributing automobiles and parts. As the Court of Appeals for the First Circuit held, directly contrary to the decision below, in *National Labor Relations Board* v. *Ken Rose Motors, Inc.*, 193 F. 2d 769, 771:

> The "Ford Sales Agreement" ties the respondent into a vast national network of an integrated distribution system which affects commerce. The activities of Ford and

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[9] See also *United States* v. *Women's Sportswear Association*, 336 U. S. 460, 464; *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 234, 236; *Wickard* v. *Filburn*, 317 U. S. 111; *United States* v. *Sullivan*, 332 U. S. 689, 696–698.

the respondent are shaped to a pattern which is found throughout the nation.

Apart from the fact that respondents' operations affect the movement of parts across state lines to Ford's assembly plant, the decisions of this Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 568–569, and *Standard Oil Co.* v. *Federal Trade Commission*, 340 U. S. 231, 237–238, establish that the movement of parts and accessories from outside Michigan through Ford's warehouse to the dealers continues to be a movement "in interstate commerce" until the goods come to rest at the dealers, so that a strike at the dealers would also "affect" that commerce. Insuring the steady and orderly interstate flow of these commodities, Ford required each respondent to maintain on hand "a stock of genuine Ford parts and approved accessories of an assortment reasonably comparable to the current demand, equivalent to at least one-sixth of the sales of parts and accessories by [respondent] during the previous twelve months" (G. 109; D. 137, 145). For the express purpose of enabling Ford "to schedule its production effectively" each respondent was required to furnish Ford with its "estimated requirements of parts and accessories" (*ibid.*). In these circumstances, we submit, the movement of parts and accessories from outside the state through Ford to its dealers falls clearly within the holding in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 568–569, that out-of-

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state goods obtained "to meet the needs of specific customers" and ordered "pursuant to a pre-existing contract or understanding" continue to move in commerce until they reach the customer, notwithstanding any stop at a warehouse or intermediate transfer of title to the wholesaler. Any doubt that the movement of parts from Ford's warehouse to respondents was "in commerce" is dispelled by this Court's recent decision in *Standard Oil Co.* v. *Federal Trade Commission,* 340 U. S. 231, 237–238, where gasoline brought into Michigan from outside the state and stored by Standard was held to be moving "in interstate commerce" when it was eventually sold to independent jobbers in Michigan.[10]

In sum, respondents are subject to the Act both because their activities directly "affect" Ford's interstate purchases, and because the movement of parts and accessories from outside the state continues to be "in interstate commerce" until they are received by the dealers so that a strike at the dealers would necessarily "affect" the movement of that commerce.

2. As an additional ground for its decision as to respondent Gilbert, the court below held that

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[10] The Court expressly noted as a basis for holding that the sales were "in interstate commerce" that "the sales involved here * * * are those of an interstate producer and refiner to a local distributor * * *." 340 U. S. at 238, n. 6. Similarly, in the instant case Ford manufactures some of the parts in other states, just as Standard Oil produced the gasoline it later distributed within Michigan (G. 73).

the Board acted beyond its powers in taking official notice of the record before it in an earlier representation proceeding involving this same respondent.[11] This holding, effecting a significant restriction upon established Board procedure, is contrary to this Court's decisions in *United States* v. *Pierce Auto Lines,* 327 U. S. 515, 519–21, 527–30, and *United States* v. *Pink,* 315 U. S. 203, 216, 218.[12]

Closely analogous is the *Pierce* case, where this Court rejected "the highly technical objection that the [Interstate Commerce] Commission, in the final stage of forming its judgment, could not in either case take account of what had been done in the other, notwithstanding the closely related character and objects of the applications and the prior proceedings." P. 528. Disposing of this argument, the Court said (*ibid.*):

> The contention in its farthest reach amounts to a legal version of the scriptural injunction against letting one's right hand know what one's left may be doing.
>
> Obviously it would be consistent neither with good sense nor, we think, with the

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[11] The facts giving rise to this issue are summarized at pp. 10–11, *supra.*

[12] See also, as to the right to take notice of prior records of the same tribunal, *Freshman* v. *Atkins,* 269 U. S. 121, 124; *Craemer* v. *Washington State,* 168 U. S. 124, 129; *National Fire Insurance Co.* v. *Thompson,* 281 U. S. 331, 336; *Dimmick* v. *Tompkins,* 194 U. S. 540, 548; *Bienville Water Supply Co.* v. *Mobile,* 186 U. S. 212, 217; Davis, *Administrative Law* (1950), Chap. 12.

> type of hearing assured by the statute to force the Commission to put on such complete blinders.

We submit that the rule of the *Pierce* case is precisely applicable here. Gilbert was represented in both proceedings; the same right of cross-examination existed; the identical commerce issue was the subject of both proceedings; and Gilbert, far from being prejudiced, cannot deny that the relevant facts "officially noticed" are undisputed.

The Board's purpose in taking official notice of the record in the earlier case was to establish the out-of-state origin of Ford parts. The other facts as to Gilbert's own purchases and sales were restipulated in the second proceeding (G. 140), and its relationship with Ford was likewise there restipulated (G. 140–142). Counsel for Gilbert was well aware that the purpose of taking official notice of the original proceeding was to include in this record the facts as to Ford's operations which had been testified to by a Ford representative (G. 190–193, 59–88). Under these circumstances the Board's right to take "official notice" is supported not only by the *Pierce* case, but also by Section 7 (d) of the Administrative Procedure Act (60 Stat. 237, 5 U. S. C. 1006 (d)), which recognizes the right of an administrative agency to take official notice of material facts not appearing in the record, provided that an affected

party upon timely request is afforded an opportunity to introduce contrary evidence.

The practice followed by the Board of taking official notice of facts contained in the prior proceeding involving Gilbert is identical to that followed by the courts in analogous situations. Thus, in *Nahtel Corporation* v. *West Virginia Pulp & Paper Co.*, 141 F. 2d 1, 2, n. 2 (C. A. 2), the court in deciding the second of two lawsuits involving some, but not all, of the same parties observed that "the stipulation of the parties herein incorporates into this record only a part of the former record; but we take judicial notice of the entire record." See also *Cushman Paper Box Machine Co.* v. *Goddard*, 95 Fed. 664, 666 (C. A. 1); *Goldstein* v. *Groesbeck*, 142 F. 2d 422, 426 (C. A. 2); *United States* v. *City of Philadelphia*, 140 F. 2d 406, 408 (C. A. 3).

The court below advanced several theories in support of its view that the Board's procedure was invalid. We believe they may be briefly disposed of, for, we submit, all are clearly erroneous.

In its original opinion the court observed (D. 156) that Section 9 (d) of the National Labor Relations Act, *infra*, p. 30,[13] did not authorize

[13] Section 9 (d) provides that where an order in an unfair labor practice case rests on facts certified in a representation case, the record in the latter case is to be reviewed when the court reviews the unfair labor practice determination. In this case the bargaining order does not rest upon facts cer-

inclusion of the earlier record. The short answer is, of course, that the Board is relying on official notice and not on Section 9 (d). While Section 9 (d) states that the record of representation proceedings underlying an unfair labor practice case "shall be included in the entire record" on judicial review of the unfair labor practice order, it in no way suggests that other related proceedings, involving the same party, must for this reason be ignored by the Board.[14] The court also stated that "this record does not show what if any facts were certified" from the original proceeding (D. 156), again overlooking the fact that the Board was taking "official notice" of the entire record, and not certifying it under Section 9 (d). Finally, the court stated—we submit, erroneously—that local Union 415 had instituted the earlier proceeding, that the parties involved

---

tified in the first representation case; the union lost the election in that case. Hence Section 9 (d) applies only to the record in the second representation case involving Gilbert.

[14] The court, initially misconceiving this point, went on in its original opinion to say (D. 156) that Section 9 (d) "prohibits the receipt of the transcript here, for the order of the Board * * * is not based * * * upon facts certified" in the earlier case. The court, however, apparently abandoned this ground in its later opinion on rehearing, after the Board pointed out that the court itself had recognized that Section 9 (d) did not preclude "the introduction of additional evidence in the complaint proceedings" (D. 156). See *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 161, 162; *National Labor Relations Board* v. *Worcester Mills Corp.*, 170 F. 2d 13, 16 (C. A. 1), certiorari denied, 336 U. S. 903.

in the second proceeding were different from those in the first, and that the issues were not necessarily identical (D. 156). The record shows, however (*supra*, pp. 10, 11), that the International Union instituted both proceedings (although it was joined by Local 408 in the second); and, what is decisive, Gilbert was respondent in both cases and the identical issue in both was whether Gilbert's activities affected commerce.

On rehearing, the court below restated its position (D. 169–170). It held that the *Pierce* case was inapplicable because in that case "Each applicant intervened in the proceeding on the other's application" and "the hearings were substantially coordinated" so that "no prejudice was shown" (D. 169). The attempted distinction of *Pierce* is manifestly inadequate; in the instant case the party affected, Gilbert, was already a named party in *both* proceedings, so that no further "coordination" of the cases was required. The court below also stated that Gilbert was "prejudiced" by testimony in the first hearing "from which it might have been concluded that some one of the twenty-two dealers made substantial interstate sales" (D. 170). Although the record in question contains such evidence as to some of the other dealers, the court below erred in finding that Gilbert was "prejudiced" thereby, for nothing in the Board's decision in that case—or in the later

proceedings against Gilbert—suggests that the Board attributed any such sales to Gilbert (or even relied on such sales for its finding that the other dealers were engaged in activities affecting commerce) (G. 24). In short, the Board took official notice of the earlier proceeding with respect to facts relevant to Gilbert; since Gilbert was a party to that proceeding and the issue was identical, Gilbert suffered no prejudice.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

ROBERT L. STERN,
Acting Solicitor General.

GEORGE J. BOTT,
General Counsel,
National Labor Relations Board.

MAY 1953.

APPENDIX

1. The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V, 151, *et seq.*), are as follows:

DEFINITIONS

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country, any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargain-

ing or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment; * * *

(b) The Board shall decide in each case whether in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: * * *

* * * * *

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), * * *

* * * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderence of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action

* * * * *

including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of ex-

traordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

2. The relevant provision of the Administrative Procedure Act (60 Stat. 273, 5 U. S. C. 1001, *et seq*), is as follows:

> SEC. 7 (d) * * * Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1952

National Labor Relations Board, *Petitioner*

v.

Bill Daniels, Inc., and Walker Motors, Inc.

National Labor Relations Board, *Petitioner*

v.

Gilbert Motor Sales, Inc.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Gilbert Motor Sales, Inc.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL DANIELS, INC., WALKER MOTORS, INC., and GILBERT MOTOR SALES, INC., respectfully pray that the petition of the NATIONAL LABOR RELATIONS BOARD for a writ of certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit entered on January 20th, 1953, which denied enforcement of orders issued by the Board against BILL DANIELS, INC., WALKER MOTORS, INC., and GILBERT MOTOR SALES, INC., be denied for the reasons hereinafter set forth.

I

STATEMENT OF THE CASE

Each of the Respondents submit that Part I of Petitioner's "Statement," which describes "the business of the several Respondents" is insufficient because it fails to bring out the complete picture of the relationship between each of them and the Ford Motor Company. In addition it is based in large measure upon conclusions reached by the Board, which were not sustained by the United States Court of Appeals for the Sixth Circuit, rather than upon the testimony introduced at the representation hearings and the hearings before the Trial Examiner in the complaint cases. In the interests of brevity and clarity, the Respondents submit the following statement of the case, which is intended to augment and supplement the Petitioner's statement and is not intended as a complete statement of the case.

A. The Business of the Respondents

The additional facts with respect to the business of each of the Respondents which should be before the Court may be summarized as follows:

1. Operations of Respondent Gilbert

Gilbert Motor Sales, Inc., a Michigan corporation, is an authorized Ford dealer engaged in the sale of new and used cars, parts and accessories and the servicing of cars (G. 140).[1] During the six month period ending December 31st,

[1]For purposes of this brief the procedure of the Board is followed in that the Gilbert record is cited as G and the Daniels-Walker record as D.

1949 its total purchases amounted to $798,021.27 (G. 140), and its total sales amounted to $842,362.80 (G. 140). The out-of-state purchases for that same period totaled $85.00 and it did not make any out-of-state sales (G. 140).

2. *Operations of Respondent Daniels*

Bill Daniels, Inc., hereinafter called "Daniels," a Michigan corporation, is an authorized Lincoln-Mercury dealer and has a sales agreement with the Lincoln-Mercury Division of the Ford Motor Company (D. 137). It is engaged in the sales of Lincoln-Mercury cars and used motor vehicles the sale of parts and the servicing of motor vehicles. It is located at 4141 Schaefer Road, Dearborn, Michigan (D. 138). It is not affiliated with any other company and has no connection with any other company. It has no connection with the Ford Motor Company other than the sales agreement with the Lincoln-Mercury Division hereinafter referred to (D. 138).

There is nothing in the Daniels-Walker record to support the Board's assumption contained on Page 9 of its petition that over half the parts handled by Respondent Daniels were manufactured outside the State of Michigan. None of the purchases made by Respondent Daniels were made outside the State of Michigan (D. 139) and only 1% of its total sales were shipped outside the State of Michigan (D. 139).

3. *Operations of Respondent Walker*

Walker Motors, Inc., a Michigan corporation, is an authorized Ford dealer with its service and sales room and place of business located at 9430 Woodward Avenue, Detroit, Michigan (D. 145). It has a sales agreement with the

Ford Motor Company of Dearborn, Michigan. The sales agreement is the same form of sales agreement that the Ford Motor Company has with all of its authorized Ford dealers (D. 145). Walker is not affiliated or associated with any other company. It is a separate and distinct legal entity (D. 146). During the period in question, Respondent Walker, did not make any purchases of any kind or any sales of any kind outside the State of Michigan (D. 146).

B. The Relationship Between the Ford Motor Company and Each of the Respondents

Each of the Respondents has a sales agreement with the Ford Motor Company or the Lincoln-Mercury Division of the Ford Motor Company, which governs the relationship between it and the Ford Motor Company, the form of this agreement being the same in all cases as Company's Exhibit No. 1 (G. 107-113). Pertinent portions of this sales agreement read as follows:

"Dealer Not to Act as Agent

> Dealer further agrees not to make any representation or warranty concerning company products on behalf of company, to refer purchasers to Manufacturers Warranty on the back of retail buyers order form, supplied by company and to not in any manner to attempt to assume or create obligations on behalf of company or in any manner attempt to act as agent of company." (G. 108, 109).

"Michigan Agreement

> That this agreement has been first signed by dealer and sent to company's office at Dearborn, Michigan for final approval and execution and has subsequently been there signed and delivered on behalf of company and the parties hereto intended to be executed as a Michigan agreement and construed in accordance with the laws of the State of Michigan." (G. 112).

"Limitation of Company's Liability

It is distinctly understood that this agreement contemplates that dealer will acquire dealer's own plant and facilities in accordance with dealer's own discretion and will purchase company products as dealer's own and resell them to customers selected by dealer, all in conformity with the requirements and limitations herein specified but otherwise in dealers own discretion. Nothing herein contained shall impose any liability on the company for any expenditures made or incurred by dealer in preparation for performance or in performance of this agreement." (G. 113).

Other pertinent portions of this sales agreement are referred to in the Board's petition, Pages 6 through 8, and hence will not be repeated here.

Under the terms of the sales agreement each Respondent is required to file a ten day dealer's report (G. 141), on the form identified as Company's Exhibit No. 2 (G. 115, 116), and a monthly financial statement (G. 141) on the form identified as Company's Exhibit No. 3 (G. 117).

When the Respondents are billed by the Ford Motor Company for new cars there is added to the invoice price a certain charge, which is part of the cost of the car to the dealer. The charge is designated as "P.A." on the invoice of the Ford Motor Company, which designates Promotion and Advertising. That money belongs to the Ford Motor Company which pays the excise tax on that amount as it does on the other charges which make up its entire invoice (G. 142).

In addition to that there is another charge which is also added to the invoice which is denominated as "D.A.," designating Dealer Advertising (G. 142). The Ford Motor Company collects that and turns it over to a Dealer's Advertising Fund, which is used by the dealers in the area of

metropolitan Detroit for the advertising of Ford cars and Ford service locally (G. 142).

Each Respondent also advertises in local newspapers, on the radio and possibly on billboards and advertising signs, all of which is done in the local area of Detroit (G. 142).

C. Proceedings Before the Board

Respondents Daniels and Walker accept Petitioner's statement contained on Pages 12 and 13 of its petition concerning the proceedings before the Board.

Respondent Gilbert accepts Petitioner's statement contained on Pages 10 and 11 of its petition concerning the proceedings before the Board but points out that the original petition in representation proceedings 7-RC-143, et al, was filed on behalf of a different local of the United Automobile Aircraft and Agricultural Implement Workers of America, C. I. O. (G. 187-188), namely, Local No. 415 (G. 40), than the local involved in the instant proceedings, which is Local No. 408 (G. 119). It should be noted that the prior proceedings involved a different period of time than that involved in the instant case and hence necessarily different facts and circumstances.

II

SUPPLEMENTAL STATEMENT OF THE CASE

As set forth in Petitioner's Specification No. 2 of errors to be urged, Respondent Gilbert, has contended as indicated by its objections in the instant complaint proceedings Case No. 7-CA-581 (G. 187-190) that the transcript in the prior representation proceedings, namely, Case No. 7-RC-143, et al, is not admissable as part of the transcript of record in the instant proceedings because the instant proceedings involved a different period of time and a different local of the union from the union involved in the prior representation proceedings, and hence, that the transcript in the prior representation proceedings had nothing to do with the petition of Local No. 408 in the representation proceedings Case No. 7-RC-960 and should not be a part of the record in the complaint proceedings arising out of the order and directive election of the Board in representation proceedings 7-RC-960. The position of Respondent Gilbert, as indicated by the instant petition, was sustained by the United States Court of Appeals for the Sixth Circuit, which held that it was error to admit the transcript of the prior representation proceedings 7-RC-143, et al, (D. 156). Undaunted, however, the Board has continued in this petition to base its statement as to Respondent Gilbert primarily on facts contained in that excluded transcript.

In the event this Court should rule against Respondent Gilbert on this question, the following supplemental statement of the case from the record in the prior representation proceedings is added. It is apparent, of course, that in any event said record could only be applicable to Respondent Gilbert and could in no way control the decision with respect to Respondents Walker and Daniels, despite obvious

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attempts by the Board to apply the excluded transcript to all three Respondents.

A. Operations of Respondent Gilbert as Disclosed by Excluded Transcript of Prior Representation Proceeding

Gilbert Motor Sales, Inc., is located and has its place of business at 10955 W. Jefferson Avenue, River Rouge, Michigan (G. 51). It is an authorized Ford dealer having a sales agreement with the Ford Motor Company of Dearborn, Michigan; the form of the agreement being the same as Company's Exhibit No. 1 (G. 51, G. 107, et seq.). Its relationship to the Ford Motor Company is governed and determined by the terms and provisions of this sales agreement (G. 51). The Board's assertion on Page 4 of its petition that Respondent Gilbert operates under a franchise from the Ford Motor Company finds no warrant in the record and is just one example of the Board's studied attempts to pass its overruled conclusions off as facts. Respondent Gilbert is not a parent or subsidiary of any other company (G. 51). It is not related or affiliated with any other Employer and does not have any other branches or locations (G. 51).

B. Relationship Between Respondent Gilbert and Ford Motor Company as Disclosed by Excluded Transcript of Prior Representation Proceeding

The Ford Motor Company, a Delaware corporation with its principal place of business in Dearborn, Michigan, is engaged in the manufacture, distribution and sale of Ford cars, trucks, tractors, bus chassis, and parts and accessories therefor, and of Lincoln and Mercury automobiles and parts and accessories therefor (G. 60). It operates manu-

facturing plants in Michigan, Ohio and New York (G. 60). The Ford Motor Company operates assembly plants in California, Georgia, Illinois, Kentucky, Michigan, Massachusetts, Minnesota, Missouri, New Jersey, New York Pennsylvania, Tennessee, Texas, and Virginia (G. 60). During the first six months of 1948, Ford Motor Company purchased approximately fifty-four percent (54%) of the parts and accessories sold to all of its dealers for service purposes from vendors with plants located outside of the State of Michigan (G. 61). In 1948 Ford Motor Company produced approximately 1,048,843 vehicles and the volume in 1949 was substantially the same (G. 61). The Ford Motor Company sells its products through dealers and at the present time it has sales agreements with approximately 7600 dealers (G. 61). With the exception of a comparatively few sales to the United States Government and sales of used company cars Ford Motor Company does not make a practice of selling vehicles directly to retail customers in the United States (G. 61).

The only regular reports dealers are required to furnish the Ford Motor Company with respect to the operation of their businesses are a ten day report of sales and a monthly financial statement (G. 61).

The Ford Sales Organization is under a vice-president in charge of sales and advertising division, who has supervision of the personnel connected with the sale and distribution of the Ford Motor Company's products (G. 61). Under this vice-president is the Ford Sales Manager, with his own staff, who supervises six regional sales managers, each of whom is in charge of one of the six sales regions into which the United States is divided for the distribution of Ford products (G. 61-62). Each region is further subdivided into four to seven districts, depending upon the size of the market and the number of dealers in the

region and district concerned, and each district is under the direction of a district manager (G. 61-62). Gilbert is in the Dearborn District, the central region of the Ford Sales Organization (G. 45-46, 62).

Ford Motor Company utilizes advertising to create favorable acceptance of its products in the following media: general magazines, business magazines, news magazines, daily newspapers, farm publications, trade and vocational publications, national network radio and television and outdoor bill boards and posters (G. 62). In addition, the company supplies its dealers with catalogs, hand-out materials, descriptive literature, display posters and sales manuals covering its products (G. 62). To help defray its advertising expenses Ford Motor Company charges the dealers a specified amount in connection with the sale of each new Ford, Mercury and Lincoln product purchased from the Ford Motor Company to be used by it for advertising and promoting the sale and servicing of Ford, Mercury and Lincoln cars and trucks and for such other purposes as the Ford Motor Company may at its discretion deem advisable (G. 62). For example commencing January 1, 1949 each Ford dealer was invoiced in connection with the purchase of each new Ford product $10.00 (G. 63). The Ford Motor Company pays the government excise tax upon such charges, the same as the Ford Motor Company pays the government excise tax on all other charges in its invoices to the dealers covering its products sold to the dealers (G. 44, G. 55, G. 56, G. 62, G. 63, G. 82, G. 142).

With respect to parts purchased by Ford Motor Company from outside the State of Michigan, they are finished parts. The vendors from whom such parts are purchased by the Ford Motor Company are independent contractors and not affiliates of the Ford Motor Company (G. 71). All parts ordered through the Ford Motor Company first come to rest

in Ford Motor Company's parts depots and warehouses in Michigan (G. 71, 74).

During the first six months of 1948 a very small percentage of cars were manufactured by the Ford Motor Company outside the State of Michigan, but whether any of them were shipped to any of the twenty-one dealers involved in the prior representation proceedings (No. 7-RC-143, et al) was not proved or established (G. 71, 72). Ford Motor Company manufactures the following products in its plants located outside the State of Michigan: radiators, springs, wheels, coil springs, running boards, running board brackets, forgings for passenger cars, trucks and tractors, transmissions, differentials, front suspensions, rear axles and engine parts (G. 73).

Under the terms of the sales agreements between Ford Motor Company and its dealers, a dealer is an independent contractor (G. 69, 70). Ford Motor Company does not supervise the service departments of dealers (G. 69, 70). Company representatives do call on dealers and advise and counsel with them with respect to problems arising in connection with the sales and servicing of the product of Ford Motor Company (G. 70). In addition, representatives of the Ford Motor Company from time to time investigate complaints in connection with alleged sales by dealers of non-genuine Ford parts which are claimed by the dealer at the time of the sale to be genuine Ford parts (G. 70). Ford dealers are not restricted in their purchases of replacement parts, the only restriction imposed on a dealer as set forth in the sales agreement is that the dealer will not in any place of business upon which dealers display company trademarks, trade names or any sign or indication that such place of business is that of an authorized Ford or Lincoln-Mercury dealer or service station, sell, recommend or knowingly allow to be recommended for sale or use as genuine

new Ford parts any parts which are not in fact genuine new Ford parts manufactured by Ford Motor Company (G. 75, 76). The Respondents and other Ford dealers are not restricted to the suggested price of the Ford Motor Company. Each Respondent and other dealers agree not to sell below that price but have the right to sell above that price if they desire to do so (G. 94).

III

ARGUMENT

SUMMARY OF THE ARGUMENT

POINT A. The Court below correctly held that the business of each of the Respondents herein did not affect commerce within the meaning of the Act.

POINT B. The Court below correctly held that the Board could not incorporate in the record for purposes of judicial review the transcript of a prior and different representation proceeding.

Point A

The Court below correctly held that the business of each of the Respondents herein did not affect commerce within the meaning of the Act.

This holding is not necessarily in conflict with the decisions of the United States Court of Appeals for the First Circuit in *N. L. R. B. v. Ken Rose Motors, Inc.*, 193 F. 2d 769 and *N. L. R. B. v. Somerville Buick Inc.*, 194 F. 2d 56 and with the decision of the United States Court of Appeals for the Ninth Circuit in *N. L. R. B. v. Howell Chevrolet Company* — F. 2d —, Volume 6, CCH Labor Law Reporter, Section 67,431. The fundamental flaw in the Board's position and its failure to properly understand the decision of the Court below is revealed in Footnote No. 8 on Page 16 of its petition where the Board says:

> "The impact of the decision of the court below cannot be restricted to automobile dealers located in Michigan. Although Ford's main plant is in Michigan,

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> it maintains assembly plants in several other States; see, for example, the *Ken Rose case*, supra. The Michigan plant is no different from the other plants in that in each the major portion of the parts which make up the completed automobile are manufactured outside the State in which the vehicle is assembled."

That statement simply does not accord with the facts. It likewise is at complete variance with the decision of the United States Court of Appeals for the Sixth Circuit, which said in its decision:

> "The circumstances that these dealers make all of their purchases in Michigan and practically all of their sales in Michigan is the controlling fact of the case." (D. 157)

As set forth above, the United States is divided into six regions for the distribution of Ford products (G. 61-62). The Respondents herein are located in the Dearborn and Detroit districts of the central region (G. 45-46, 62). To supply these six regions the Ford Motor Company maintains three manufacturing plants, one of which is located in Michigan (G. 60). The reason that parts are shipped to Ford Motor Company plants in Michigan from out-of-state suppliers is not because Respondents are in business in Michigan but because one of Ford Motor Company's three manufacturing plants and one of its assembly plants, from which motor vehicles are shipped all over the central region of the United States, are located in Michigan. It likewise should be remembered that the parts purchased by Ford Motor Company from vendors outside the State of Michigan all come to rest in Ford depots and warehouses in Michigan, from which they are taken as the needs of the Company dictate. Under these circumstances the interstate flow of these parts ends with their delivery in Michigan. If for reasons of lack of public acceptance, for example, there were no Ford dealers in Michigan, the interstate flow of

parts into Michigan would continue unabated to supply the parts necessary to manufacture and assemble cars for shipment to its central region. In brief, then, the Respondents and other similarly situated Ford dealers are in a unique position, in that they are not either directly or remotely the cause of interstate movement of parts and motor vehicles. It is obvious, of course, that if no one in Michigan purchased Ford products, the Ford Motor Company might suffer a drop in gross sales but surely the line between interstate and intrastate commerce is not so finely spun.

A comparison of the instant situation with the decisions above referred to, which are cited by the Petitioner as being in direct conflict with the decision of the Court below, reveals factual distinctions which are material.

The decision of the United States Court of Appeals for the Ninth Circuit in the *Howell case*, supra held that the Respondent, California Chevrolet dealer, which purchased all of its new cars and trucks from an assembly plant at Van Nuys, California, which in turn had obtained 43% of its component parts from outside the state, was engaged in commerce within the meaning of the Act. Two of the three judges who decided that case filed a concurring opinion which is brief and to the point:

> "Stephens, C. J. concurring: Once the business of the automobile dealer is held to be in intersate commerce, there is nothing to do but order the Board's order enforced. And this we must do under *National Labor Relations Board v. Hearst Publications, Inc.*, 1944, 322 U. S. 111(8 Labor Cases 51, 179), and *National Labor Relations Board v. Townsend*, 1950, 185 F. (2d) 378 (18 Labor Cases 65,967).
>
> Notwithstanding, I remain unconvinced that the word "employee" actually means more in the Wagner Act than elsewhere (*Hearst case*) or that a simple business transaction within a state is interstate commerce because of a fine-spun tracing of a remotely

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possible and unmeasurable relation to trade across a state line (*Townsend case*). Judge Harrison joins me in this concurrence."

It is apparent that the *Howell decision* was based in large part on the decision of the same Court in the case of *N. L. R. B. v. M. L. Townsend,* 185 F. 2d 378. In that case the Respondent was a Hudson retail dealer who purchased cars in California from the Hudson Motor Sales Corporation which, in turn, purchased its cars from out-of-state. The Court held that the threat of unfair labor practices of the Respondent, a retailer of new automobiles which originated out-of-state, presented such a threat of substantially interfering with the free flow of goods across the state lines that its activities were within the scope of the Act.

> "We think it apparent that the cessation of respondent's business due to a strike caused by its unfair labor practices would inevitably decrease the number of automobiles brought from without the State by the Hudson Sales Corporation during the period when respondents ceased to buy them because of a strike caused stoppage of its business of selling them."

It is clear that the Court based its decision in that case on the fact that cessation of Respondent's business would decrease the flow of vehicles brought from without the State.

After reviewing its decision in the *Townsend case,* the Court said in the *Howell case,*

> "We think that the difference between this and the *Townsend case* is one of degree only and not of substance."
>
> "Both because this Court's decision in the *"Townsend" case* supra, controls us here and because the Board's finding on the effect of this contractual relationship on the flow of interstate commerce is one which we should not disturb, we hold that the Board's finding that the respondent was engaged in commerce

> within the meaning of the Act must be affirmed by us."

It appears then that at least in large part these two decisions from the Ninth Circuit were based on the theory of causation, namely, that the activities of the respective respondents were directly responsible for the flow of goods in interstate commerce. As indicated above, that theory is not applicable to these Michigan respondents.

With respect to the two cases decided by the United States Court of Appeals for the First Circuit, the *Somerville case*, supra, was decided on authority of the *Rose case*, supra, without any further discussion of the jurisdictional issue.

In the *Rose case*, supra, an authorized Ford dealer located in Massachusetts purchased virtually all of its new cars, trucks and parts from a Massachusetts assembly plant of the Ford Motor Company and all of its sales were intrastate. The Court disposed of the issue of the jurisdiction of the National Labor Relations Board in one sentence:

> "The Ford Sales Agreement ties the respondent into a vast national network of an integrated distribution system which affects commerce."

The only authorities cited in support of this conclusion, which is otherwise unexplained, are *N. L. R. B. v. Conover Motor Co.* (Tenth Circuit) 192 F. 2d 779, and *N. L. R. B. v. Davis Motors, Inc.* (Tenth Circuit) 192 F. 2d 782.

The *Conover case*, supra, involved a Chrysler dealer. All of the new automobiles it purchased in 1949 were shipped to it from outside the State of Colorado. Likewise, in the *Davis case*, supra, the dealer purchased all of its new vehicles from out-of-state and the Court concluded that the fact that the dealer had a non-exclusive franchise did not mean that the work stoppage caused by a labor dispute

would not impede, burden or obstruct the free flow of interstate commerce.

It is readily apparent that the *Conover* and *Davis cases*, supra, are distinguishable from the instant cases in that the dealers involved in those cases were again directly responsible for the flow of vehicles in interstate commerce. While it is true that some of the language employed in the *Conover case* appears applicable to the cases at bar, a review of the facts indicates a clear and basic distinction between it and the instant cases and reveals that said decision should have been, if in fact it was not, based on the direct relationship of the activities of the Respondent to the interstate flow of goods.

With respect to the *Rose case*, it should be noted that the statement of the case does not accurately describe the scope of the operation of the Ford assembly plant in Massachusetts. It does not state whether that plant existed solely for the benefit of Massachusetts automobile dealers or whether it serviced a wider area. If the Court's decision was based upon the fact that the Massachusetts assembly plant for the Ford Motor Company serviced only Massachusetts Ford dealers, then obviously the case is not irreconcilable with the decision of the Court below, because there too the Court may have found that the dealer was directly responsible for the flow of goods in interstate commerce.

There can be no question but that there is a conflict between the United States Court of Appeals for the Sixth Circuit and the United States Courts of Appeals for the First and Ninth Circuits in the language of the various opinions as to the effect of the sales agreement between the various automobile dealers and the companies. However, the conflict appears more readily explained by the difference in the factual situations than by a difference of opinion

as to the scope of the commerce clause and the National Labor Relations Act. As the Court below said:

> "The Board urges that the geographical location of these dealers is not significant. But if the operation is entirely intrastate and one which would not substantially affect or injure interstate commerce the Board has no jurisdiction. The circumstance that these dealers made all of their purchases in Michigan and practically all of their sales in Michigan is the controlling fact of the case.
>
> If construed as the Board contends in this case the constitutional term "interstate commerce" will lose its meaning. The boundary between state and nation will be obliterated. As stated by Chief Justice Hughes in *N. L. R. B. v. Jones & Laughlin Steel Corporation*, 301 U. S. 1, 31:
>
> "The grant of authority to the Board does not purport to extend to the relationship between all industrial employees and employers. Its terms do not impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce. It purports to reach only what may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds."
>
> "The Supreme Court continues, speaking of the scope of congressional power of control over intrastate activities that have a close and substantial relation to interstate commerce, page 37:
>
> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." (D. 157)

It is plain then that by its express terms the decision of the United States Court of Appeals for the Sixth Circuit

in the instant case is applicable only to Michigan Ford Dealers and hence not in conflict with the cases cited by the Board.

It is further submitted that there is no conflict between the decision of the Court below and the decisions of this Court in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 and *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, both of which were considered by the Court below on the Board's petition for re-hearing. In the *Jacksonville Paper case*, this Court held that goods purchased by a wholesaler upon the order of a customer with definite intention that such goods shall be carried at once to the customer and goods obtained by a wholesaler to meet the needs of specified customers pursuant to an understanding thereof not for immediate delivery were all within the stream of commerce until delivery was made. From the facts as set forth above, it is apparent that that decision is in no wise applicable to the instant cases.

More recently in the case of *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, this Court held that gasoline delivered to customers in Detroit, which was taken from a gasoline terminal to which gasoline was brought from the Indiana refinery for the customers in the Detroit area was in interstate commerce within the meaning of the Clayton-Patman Act, while en rouute to delivery in that area.

> "Such temporary storage of the gasoline as occurs within the Detroit area does not deprive the gasoline of its interstate character."

This Court has often stated that decisions construing one Act of Congress are not very helpful in subsequently construing another Act. As Justice Frankfurter said in *Polish National Alliance v. N. L. R. B.*, 322 U. S. 643:

> "Constitutional questions that look alike often are altogether different and call for different answers because they bring into play different provisions of the

constitution or different exertions of power under it."

It does not seem appropriate for the purposes of this brief to discuss the question of whether cases holding a movement "in commerce" under the Fair Labor Standards Act are applicable to the "affecting commerce" clause of the National Labor Relations Act, because it is immediately apparent that there is a fundamental distinction between the instant cases and the *Standard Oil case*. The record will not sustain the Board's implied assumption that the parts manufactured outside the state were brought into Michigan because the Respondents were located there. As set forth above, these parts flow into Michigan from out-of-state suppliers because the Ford Motor Company has plants in Michigan where new cars are manufactured and assembled, and from which the vehicles and parts are distributed to retail dealers in the central region. The element of causation is lacking, and therefore, the shipments of cars and parts to these Respondents by the Ford Motor Company are not analagous to the shipments of goods in the *Standard Oil case*.

A decision overruling the United States Court of Appeals for the Sixth Circuit and sustaining the Board's theory that because these Respondents have a sales agreement with the Ford Motor Company or a divison thereof they are *ipso facto* in an activity affecting commerce within the meaning of the Act regardless of the fact that they buy and sell locally in Michigan, can only result in the total obliteration of the distinction between interstate and local commerce. It is elementary in our modern industrial society that all manufacturing activities are geared to supply and demand. Obviously any manufacturer who distributes his product on a nationwide basis keys his manufacturing program to the demand for the product, and it is equally obvious that a cessation of the demand in

any locality for any reason whatsoever would logically, though only to a minute and immeasurable amount, affect the activities of that manufacturer whether he is selling a water pistol or an automobile. There can be no distinction either in fact or in law between the activities of these Respondents and the activities of any retailer who buys and sells locally a nationally advertised product, some of the component parts of which initially originated out-of-state. The distinctions between the relationship which exist between the Ford Motor Company and these Respondents and the relationship between any other manufacturer and retail outlets are only distinctions occasioned by the nature of motor vehicles, which obviously must be handled by a dealer who is equipped to carry and service them. These are only distinctions of degree and not of substance. The relationship of the activities of these Respondents to interstate commerce is just as remote and immeasurable. To sustain the Board's position is to state in effect that any retailer who handles a nationally advertised product is in an activity affecting commerce and to extinguish for all time the heretofore jealously guarded line of demarcation between those interstate activities properly within the province of the Federal government and local transactions heretofore left to the control of the forty-eight states.

Point B

The Court below correctly held that the Board could not incorporate in the record for purposes of judicial review the transcript of a prior and different representation proceeding.

The Board contends that it took official notice of the record in an earlier representation proceeding involving Respondent Gilbert, but a review of the facts[2] reveals that

[2]a summary of which is contained on Pages 10-11 of the Board's Petition.

the Board did much more than this. At the outset of the representation proceeding upon which the instant complaint against Respondent Gilbert is based, which was Case No. 7-RC-960, counsel objected to the hearing on the grounds that the Board was without jurisdiction (G. 138-139), which objection was overruled (G. 139). At that time testimony was taken and the Board determined that Respondent Gilbert was engaged in an activity affecting commerce, and therefore, subject to its jurisdiction.

Subsequently on April 16th, 1951, the instant complaint case was filed, which was Case No. 7-CA-581 (G. 145, et seq.), and a hearing thereon was held on July 23rd, 1951 (G. 179, et seq.). At the conclusion of that hearing and after the Board had already overruled Respondent's objections and determined that it had jurisdiction, it incorporated the record of the prior representation proceeding between a different local union and Respondent Gilbert, which record covered a different period of time and involved different parties (G. 190), the same being Case No. 7-RC-143.

It is submitted that this procedure cannot be justified by the glib assertion that the Board is taking "official notice" of its records just as a Court takes judicial notice of its records. If, in a civil suit a judgment obtained in a prior action in the same Court between the same parties were pleaded in bar, would the Courts take judicial notice of that former judgment? Most emphatically no.

> "By the weight of authority even where a judgment of the same Court is pleaded as a bar or as conclusive of an issue, the existence and contents of the judgment must be proved by offering the record or a certified copy thereof in evidence." (*96 A.L.R.* 945)

If the Courts will not take judicial notice of their own judgments under such narrow circumstances, the Board was certainly not justified in taking what it calls official

notice of a prior and different proceeding and incorporating the record thereof in the record of this case for purposes of judicial review.

As a matter of fact the Board is merely using the term "official notice" in an attempt to justify its irregular procedure. Since official notice is merely the Administrative Agency's counterpart of judicial notice, it is interesting to read a definition of judicial notice.

> "Judicial notice," the act by which a Court in conducting a trial or framing its decision will of its own motion and without the production of evidence recognize the existence and truth of certain facts having a bearing on the controversy at bar, which from their nature are not properly the subject of testimony or which are universally regarded as established by common notoriety, e. g., the law of the state, international law, historical events, the constitution and course of nature, main geographical features, etc." (*Black's Law Dictionary*, Third Edition.)

The procedure of the Board so far transcended the bounds of official notice that no further comment seems necessary.

However, the Board proclaims that the holding of the Court below is contrary to this Court's decision in *United States v. Pierce Auto Lines*, 327 U. S. 515. As the Court will undoubtedly recall that case involved an application by two motor carriers for Certificates of Public Convenience and Necessity to substitute independent and competing service between certain cities which the two applicants had serviced jointly prior to these individual applications. The Court continues a description of the proceedings (p. 20) as follows:

> "However, because they were so closely related in their common features, the hearings were held at the same place and one application was heard immediately after the other. Each applicant intervened in the pro-

ceedings on the Court's applications and various parties including the appellees appeared in opposition in both proceedings. *The parties stipulated that much of the evidence presented in the O. N. C. hearing should be introduced by reference into the Consolidated record.*" (emphasis our own)

"This included all of the appellees affirmative evidence in opposition to the two applications. The hearings thus were substantially coordinated, though technically not consolidated for the common features of the applications."

Thereafter the Commission ultimately dealt with both applications in a single report. The basis of the appellants' objections to this procedure was not that the Commission had improperly considered evidence or had impropely incorporated evidence into the record but that the Commission improperly considered two separate records as though the cases were consolidated and the findings and conclusions in the separate proceedings were so comingled in a single report as to make it impossible to determine therefrom which record gave support to them.

This is the background for the excerpts from this Court's opinion contained in the Board's Petition. It is submitted that the factual situation has nothing in common with the Board's conduct in the instant case and that when read in is entirety the *Pierce case* presents no authority for the introduction into evidence of a transcript from a prior and different proceeding.

The Board next adopts the position that its procedure was authorized by the *Adminstrative Procedure Act* (60 Stat. 237, 5 U. S. C. 1006(d), 5 U. S. C. A. 1006(d)). As set forth above the jurisdictional issue was raised and decided in the second representation proceeding No. 7-RC-960. If the Board had decided to incorporate the record of the prior and distinct representation proceeding, Case No. 7-RC-143, it would not have been authorized to do so by

the *Administrative Procedure Act.* The application of Section 7(d), portions of which are reprinted in the Appendix hereto, is limited to "hearings which Section 1003 or 1004 of this Title requires to be conducted pursuant to this section." By its express terms Section 1004 which will be found in the Appendix hereto, excludes from its application and from the application of 1006, hearings involving the certification of employee representatives.

It is apparent, therefore, that under the very terms of the *Adminstrative Procedure Act,* the Board's procedure was not proper.

The Board concludes its argument on this subject by stating that "nothing in the Board's decision in that case or in the later proceedings against Gilbert suggests that the Board attributed any such sales to Gilbert (or even relied on such sales or its finding the other dealers were engaged in activities affecting commerce). In short, the Board took official notice of the earlier proceeding with respect to facts relevant to Gilbert; since Gilbert was a party to that proceedings and the issue was indentical Gilbert suffered no prejudice."

The hollowness of this virtuous pronouncement is self-evident from the Board's own petition on Page 9 where in describing the operations of Bill Daniels, Inc., it includes data from the record in the prior Gilbert representation proceedings, which record was properly excluded by the Court below.

CONCLUSION

It is, therefore, respectfully submitted that this case is not a proper one for review by certiorari in this Court and that the Petition for a Writ of Certiorari should be denied.

Dated: June 8th, 1953.

FRANK E. KENNEY,
(HAROLD E. MOUNTAIN, JR., *of counsel*),
Attorney for,
Bill Daniels, Inc.,
Walker Motors, Inc., and
Gilbert Motor Sales, Inc.

APPENDIX

1. The relevant provisions of the *Administrative Procedure Act* (60 Stat. 237, 5 U.S.C. 1001 et seq., 5 U.S.C.A. 1001 et seq. are as follows:

"Section 1004. Adjudications

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts *de novo* in any court; (2) the selection or tenure of an officer or employee of the United States other than examiners appointed pursuant to section 1010 of this title; (3) proceedings in which decisions rest solely on inspections, tests, or elections; (4) the conduct of military, naval, or foreign affairs functions; (5) cases in which an agency is acting as an agent for a court; and (6) the certification of employee representatives."

"Section 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section * * *.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any part shall on timely request be afforded an opportunity to show the contrary."

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HAROLD B. WILLEY

No. 81

In The

Supreme Court of the United States

October Term, 1953

National Labor Relations Board, *Petitioner*,

v.

Bill Daniels, Inc., and Walker Motors, Inc.

National Labor Relations Board, *Petitioner*,

v.

Gilbert Motor Sales, Inc.

PETITION FOR REHEARING

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PETITION FOR REHEARING

TO THE UNITED STATES SUPREME COURT AND THE JUSTICES THEREOF:

Your petitioners, BILL DANIELS, INC., WALKER MOTORS, INC., and GILBERT MOTOR SALES, INC., respectfully pray that they be granted a rehearing of the above entitled cause.

Grounds Relied Upon For Rehearing

On January 4, 1954, this Court in acting upon a petition filed by the National Labor Relations Board, which prayed only for the issuance of a writ of certiorari, entered the following Order:

> "*PER CURIAM*: The petition for writ of certiorari is granted and the judgment is reversed. *Howell Chevrolet Co. v. National Labor Relations Board, No.* 34, October Term 1953, decided December 14, 1953."

In the *Howell case,* which the Court deemed controlling upon your petitioners, two grounds were assigned for supporting the National Labor Relations Board's finding of jurisdiction:

(1) That 43% of the merchandise purchased by Howell from a General Motors assembly plant located in California, was manufactured in other states and shipped to California for assembly or distribution.

(2) Sweeping control of Howell's local retail establishment exercised by General Motors by virtue of its "direct dealer selling agreement."

It is the petitioners' belief that the Order of the Court herein is in error in the following respects:

(1) The Court has, at least by implication, approved the Board's practice of incorporating in the record for purposes of judicial review the transcript of a prior and different representation proceeding. This issue was not presented in the Howell case. The evidence properly in the record in these cases does not support the asserted jurisdiction of the Board.

(2) Unlike the dealer in the Howell case none of these petitioners are responsible for the flow of goods in interstate commerce.

(3) These petitioners are individually owned, privately financed, independent retail merchants. They are not agents for, nor are they an integral part of the Ford Motor Company. Their retail establishments are not subject to sweeping control by the Ford Motor Company.

(4) If these petitioners are engaged in an activity affecting interstate commerce within the meaning of the National Labor Relations Act, the distinction between interstate and intrastate commerce has been obliterated.

ARGUMENT

I

This Court's Order of January 4, 1954 granting certiorari does not exclude the following question which was presented as Question 2 in the Board's petition for certiorari:

> "2. Whether the Board, in determining whether a respondent's business affects interstate commerce, properly took official notice of evidence contained in a prior proceeding before it which involved the same respondent and the same issue."

This question was not, moreover, involved in the *Howell case* upon which this Court rests its decision herein.

A brief summary of the facts will illustrate the full impact of this issue. On April 27th, 1948 the United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., filed a petition upon which the National Labor Relations Board conducted hearings to determine whether a question of representation affecting interstate commerce existed at the establishments of twenty-one Michigan Ford dealers, one of whom was petitioner Gilbert Motor Sales. These proceedings are reported as Johns Brothers, et al, 84 N.L.R.B. 294. In a subsequent election conducted by the Board on July 21st, 1949, the Union received less than a majority of the votes cast by petitioner Gilbert's employees, thus closing the case as far as Gilbert was concerned.

More than two years after the original petition, Local No. 408 of the United Automobile, Aircraft and Agricultural Implement Workers of America, C.I.O., filed a new petition

on May 15th, 1950 seeking to represent petitioner Gilbert's employees. Another representation hearing was conducted, in which the issue of the Board's jurisdiction over Gilbert was litigated. Subsequently, upon charges thereafter filed by the Union, a complaint hearing was held by the Board. At the conclusion of this hearing, and after the Trial Examiner had already overruled objections to the Board's jurisdiction, General Counsel for the Board was permitted, over objections of counsel for Gilbert Motor Sales, to incorporate in the record of this new proceeding the entire record in the *Johns Brothers case*. In its petition for certiorari, the Board referred almost exclusively to the Johns Brothers record, which deals in large part with the activities of Ford dealers other than petitioner Gilbert.

By this decision the Court has *sub silentio* approved of the Board's practice of incorporating in the record for the purposes of judicial review the transcript of a prior and different representation proceeding. This practice has been adopted by the Board upon the assumption that among the matters of which it may take "official notice" under Section 7(d) of the Administrative Procedure Act is the entire transcript-viz; all pleadings, testimony, exhibits and findings of the former unrelated proceedings. The Board has, we are convinced, misconceived the proper scope of the device of "official notice", using it, not as a means of avoiding unnecessary proof of an obvious, generally acknowledged, or publicly recorded fact, but rather as a broadly applied substitute for evidentiary proof of the Board's assertions of fact which are being contested in the litigation. These petitioners believe that a definition of the legitimate sphere of "official notice" is of paramount importance to administrative agencies, to those who practice before them, and to the judiciary alike. They submit that the issue has not heretofore been expressly adjudicated and that it

merits serious consideration by this Court, assisted by argument and briefs from counsel.

The Court's decision of this issue will also bear directly upon the validity of the Board's findings that petitioners' activities affect commerce. Much of the evidence relied upon by the Board in making its findings against petitioner Gilbert was extracted as a matter of "official notice" from the record of the prior proceeding. We emphasize further that this prior proceeding in any event involved only petitioner Gilbert and not petitioners Daniels or Walker. Nevertheless, the Board in seeking to sustain its findings has in all its briefs and petitions below and in this Court, treated the material contained in the transcript indiscriminately as applying to all three petitioners equally. The evidence properly in the record before this Court will not, we submit, support the claimed jurisdiction of the Board to proceed against petitioners.

II

In its Opinion in the *Howell case*, this Court emphasized that 43% of the merchandise purchased by the dealer from the California General Motors assembly plant was manufactured in other states and shipped to California for assembly or distribution. It was undoubtedly impressed by the realization that should all California Chevrolet dealers cease operations, activity at the General Motors assembly plant in California would grind to a halt. This would necessarily obstruct the interstate flow of parts into California.

How different is the picture presented by the instant cases. Envision, if you will, the United States divided into six Regions for the distribution of Ford Motor Company

products (G. 61-62).[1] As you look out the window of petitioner Daniels' showroom, you gaze upon one of Ford's three manufacturing plants. Not far away is one of its thirteen assembly plants. From these two Michigan plants cars and trucks are shipped to all points in the Central Region.

Yes, you say, but a percentage of the component parts utilized by Ford Motor Company in the manufacture of its vehicles at its Dearborn, Michigan plant originated outside the State of Michigan. And so they did. This statistic becomes unimportant, however, when you realize that out-of-state suppliers would continue to ship their wares to the Ford Motor Company plants in Michigan if there were not a single Ford dealer in the entire state. The rest of the Central Region must be supplied, and the production lines would continue to roll. Similarly, the parts purchased by Ford Motor Company in interstate commerce all come to rest in Ford depots and warehouses in Michigan from which they are taken by Ford Motor Company as required. Under these circumstances, the interstate flow ceases upon their delivery to the Ford Motor Company in Michigan.

Your petitioners submit, therefore, that they are in a unique position in that they are not the cause of the interstate movement of motor vehicles or parts. In fact, their activities do not affect interstate commerce to any greater degree than the activities of any retailer who handles a nationally distributed product. Naturally, if no one in Michigan purchased Ford products there might be years in which the Ford Motor Company would suffer a drop in

[1] As explained more fully in their brief in opposition to the Board's petition for certiorari the Daniels and Walker cases were consolidated before the Board and the Gilbert case was consolidated with the Daniels-Walker case for purposes of oral argument in the United States Court of Appeals for the Sixth Circuit. For purposes of this petition the Gilbert record is cited as "G".

gross sales. Surely, however, the line between interstate and intra-state commerce is not so finely spun.

> "The well settled test of the applicability to specific operations is whether a 'stoppage of * * * operations by industrial strife' in the enterprise in question would result in substantial interruption to or interference with the free flow of commerce." (*Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197, 220-221; *N. L. R. B. v. Bradford Dyeing Association*, 310 U. S. 318, 326).

III

We come now to the Board's proposition that your petitioners are an integral part of the Ford Motor Company. Would that they were! Then when overstocked beyond their sales requirements they could return their surplus vehicles to the "vast Ford industrial empire" and let another "integral part" sell them. No, the hard facts are that these petitioners are individually owned and operated, privately financed retail merchants. They purchase vehicles, parts and accessories from the Ford Motor Company and sell them to their customers.

It is true that they signed a Ford Sales Agreement but this agreement is in no way as restrictive as that presented in the *Howell case*. Illustrative of this point are these three paragraphs in the General Motors Selling Agreement, which have no counterpart in the Ford Sales Agreement.

(1) "11. Dealers Personal Services.

> Each person named in Paragraph third of this Agreement shall devote his full time, attention and energy to the conduct of dealers business hereunder."

(2) "12. Dealers Place of Business

Satisfactory to Seller.

* * * dealer will not move to or establish a new location, branch sales office, branch service station or place of business, including any used car lot or location without the prior written consent of seller."

(3) "14. Capital Requirements.

Since the amount and structure of working capital and net worth required to handle properly the business to be conducted by dealer hereunder depends upon many factors, including size of market, sales and service facilities required, anticipated volume and others, and since seller has set standards for dealer capital and net worth based upon seller's past experience, dealer shall establish his owned net working capital and net worth in the respective amount and form specified by seller. If the amount of owned net working capital or net worth or the way in which either is set up is now or hereafter inadequate in seller's estimation for the proper handling of dealer's business, dealer will take the necessary steps to meet seller's applicable requirements within the time determined by seller."

Aside from the terms of the agreement, the Ford Motor Company does not in practice exercise sweeping control over your petitioners. The records in the instant cases clearly show that they enjoy freedom of action and opportunity for individual initiative in the sale of their products (G. 8-105).

It is for these reasons that Courts of various jurisdictions have held Ford dealers to be independent contractors.

Burkhalter v. Ford Motor Company, 116 S.E. 333;
Ford Motor Company v. Union Motor Sales Co., CCA 6th. 244 F. 156.

As the Court said in the *Burkhalter case*, at Page 337:

> "The relation established by the contract was that of vendor and purchaser, and not that of principal and agent."

IV

As your petitioners read the Order herein and pondered the fate of the distinction between interstate and intra-state commerce they were reminded of KoKo's line in the Mikado, "Consequently that gentleman is as good as dead—practically he is dead—and if he is dead why not say so?"

Your petitioners believe that to extend the *Howell decision* to the facts above set forth and to hold that they are engaged in an activity affecting interstate commerce within the meaning of the National Labor Relations Act merely because they are parties to the Ford Sales Agreement is to transcend anything contemplated by the framers of the commerce clause. This Court put it very well in the case of *N. L. R. B. v. Jones & Laughlin Steel Corporation*, 301 U. S. 1 at Page 37, when it said:

> "Undoubtedly the scope of this power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them in view of our complex society would eventually obliterate the distinction between what is national and what is local and create a completely centralized government."

What legal or factual distinction can be made between the activities of these petitioners and those of any retailer from Bangor, Maine to Bakersfield, California who handles a nationally distributed product? It is axiomatic that all

manufacturers must exercise some control over the activities of the retailer who handles their product so that the jealously guarded reputation of the particular "brand name" will not be impaired. So it is that the television dealer must install, adjust and service the sets he sells in accordance with factory specifications and warranties. The corner druggist must not sell camera film after a certain date. A local paint dealer must rotate his stock in accordance with manufacturer's instructions and must return all paint not sold within a specified period. Even the corner grocer must not sell his milk after the date stamped on the carton.

These retailers, too, are subject to a certain amount of supervision. Salesmen call to counsel them on advertising and display policies, and to verify that the manufacturer's policies are being carried out with respect to marketing and distribution of the product.

The distinctions which exist in the relationship between the Ford Motor Company and your petitioners and the relationship of any other manufacturer and its retail outlets are only distinctions occasioned by the very nature of motor vehicles. They are merely differences of degree and not of substance.

As they file this petition your petitioners are mindful of what this Court said in the case of *Consolidated Edison Co. v. N. L. R. B.*, 305 U. S. 197 at Page 223:

> "Justification for the exercise of Federal power should clearly appear."

They are likewise mindful of the fact that the decision of the United States Court of Appeals for the Sixth Circuit was rendered only after consideration of complete briefs submitted by each side and oral arguments of counsel for the Board and your petitioners.

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They respectfully submit that the issues presented herein are of overwhelming importance to these petitioners and the other Ford dealers in the State of Michigan. This Court, by granting certiorari, has recognized the national importance of these cases. Your petitioners, therefore, respectfully urge that in view of this fact they be permitted to be heard in support of their position and in support of the decision of the United States Court of Appeals for the Sixth Circuit.

Conclusion

WHEREFORE, upon the foregoing grounds, it is respectfully urged that this Petition for Rehearing be granted and that the judgment of the United States Court of Appeals for the Sixth Circuit upon further consideration, be affirmed.

Respectfully submitted,

FRANK E. KENNEY,
Counsel for
Bill Daniels, Inc.,
Walker Motors, Inc., and
Gilbert Motor Sales, Inc.

January, 1954

CERTIFICATE OF COUNSEL

I, counsel for the above named respondents, do hereby certify that the foregoing Petition for Rehearing of this cause is presented in good faith and not for delay.

FRANK E. KENNEY,
Counsel for
Bill Daniels, Inc.,
Walker Motors, Inc., and
Gilbert Motor Sales, Inc.

'D THROUGH POOR COPY

JANUARY 4, 1954.

Per Curiam Decisions.

No. 81. NATIONAL LABOR RELATIONS BOARD *v.* BILL DANIELS, INC. ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Per Curiam:* The petition for writ of certiorari is granted and the judgment is reversed. *Howell Chevrolet Co.* v. *Labor Board*, 346 U. S. 482. *Acting Solicitor Gen-*

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eral Stern and *George J. Bott* for petitioner. *Frank E. Kenney* and *Harold E. Mountain, Jr.* for respondents. Reported below: 202 F. 2d 579.